No. 13403

United States
Court of Appeals
For the Ninth Circuit

WEST COAST FAST FREIGHT, INC., a corporation,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Reply Brief of Appellant

Appeal from the United States District Court for the Northern District of California, Southern Division.

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I.

PRELIMINARY STATEMENT

In this Reply the several arguments in the Brief of Appellee will be discussed in the order therein presented. Footnote reference is made at the beginning of each part hereof to the portion of the Brief of Appellee being considered.

II.

COMMENT UPON THE STATEMENT OF THE CASE[1]

Two somewhat related statements in appellee's statement of the case require some comment. They are: "The contents of the trailers and the shipments therein were identified by government bills of lading and the Wells Cargo Freight bills. . . . A description of the contents as contained in the Wells Cargo Freight bills and the government bills of lading was accepted by appellant without challenge." (Appellee's Brief, p. 3.)

It is respectfully submitted that, except to a very limited extent, neither of these statements can be supported by the record. As to Counts 2, 3 and 9 some government bills of lading are of record. As to Count 3 there is a bill of lading of Wells Cargo. A variation exists between the government bill and the Wells Cargo bill. (Ex. A.) The only other evidence appellant can discover which could possibly be taken as support for the statements made is certain general information furnished by Mr. Strock. (Tr. 160-161).[2] This testimony must, however, be read in its relation to other testimony. (Tr. 171, 196-203.)

Appellant respectfully submits, that except to the limited extent set forth above as to Counts 2, 3 and 9

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[1]Appellee's Brief, Item IV, pp. 2-4.
[2]References are to pages of the transcript.

there is no evidence of record to support the statements above quoted that the contents of the trailers were identified by bills of lading or that appellant used any such documentation as the actual basis for the preparation of the particular freight bills here the subject of examination. Upon this record what may have been the actual source of the information upon appellant's freight bills is entirely a matter of conjecture.

III.

APPELLEE'S STATEMENT OF THE QUESTION FAILS TO PRESENT THE ISSUE[3]

Appellee urges that the sole question here presented is the sufficiency of the evidence to sustain the conviction. Other and more basic issues are involved. The "primary jurisdiction" doctrine raises a jurisdictional question. If determined in favor of the appellant the question of sufficiency of the evidence does not arise.

Related to the question of sufficiency of the evidence, but distinct from it in some respects, is the question of the propriety of the action of the trial court in admitting Exhibits 3-22.[4] Virtually the entire case of the United States is predicated upon the information contained in these documents. If they were improperly received, no other evidence to prove either

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[3]Appellee's Brief, Item V, p. 4.

[4]The phrase "Exhibits 3-22" is used for purpose of brevity to identity the exhibits within this range of numbers relating to counts of the information which are the subject of appeal.

the transportation or the nature of the products moved remains. Under the circumstances the insufficiency of the evidence, without these exhibits, is conclusively established.

IV.

REPLY TO THE ARGUMENTS OF APPELLEE

1. Reply to the argument that the language contained in appellant's certificates is stated in the form and language common to Commission practice.[5]

Appellant has never contended at any point in this proceeding that the language contained in its certificates is an "innovation". Appellant is fully aware that the words "except dangerous explosives" appear in many certificates issued by the Interstate Commerce Commission. The language used in appellant's certificates is not, however, one which can be said to be uniform or standard. There are set forth in the Appendix as Item 1 thereof a number of decisions of the Commission using other language designed to describe exceptions of the same general type.

Appellant does urge, in connection with the primary jurisdiction argument, that the words "except dangerous explosives" do have a questionable meaning. More important, their meaning raises a question of fact and not a question of law. The questionable meaning of the language used will be discussed below.

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[5]Appellee's Brief, Argument A.1., pages 5 and 6.

2. The meaning of the term "dangerous explosives" has not been so defined by the Commission that its meaning can be said to have been fixed as a matter of law.[6]

The question of the meaning of the term "dangerous explosives" cannot be divorced from the question of the "primary jurisdiction" doctrine as appellee attempts to do.

Appellant has been charged with the transportation of certain commodities described by class. Appellant has a certificate which authorizes the transportation of commodities generally, a term, as appellee points out, considered by the Commission to include all commodities other than those expressly excepted. The certificate of appellant contains an express exception against the transportation of "dangerous explosives". The problem is immediately presented, therefore, as to the meaning of the language used in the exception.

The problem is not whether or not the trial court could reasonably come to the conclusion that it did upon the evidence before it, but rather whether or not the court should have undertaken the determination at all.

In the appellant's brief considerable time has been devoted to the statements of the principles involving the applicability of the primary jurisdiction doctrine. Counsel for the appellant believe it will suffice here to point out, based upon the citations heretofore given,

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[6]Appellee's Brief, Argument A.2., pages 7 to 13.

that the trial court was justified in proceeding with the trial of the action only if it appeared: (a) that the words requiring definition were used in their common and ordinary meaning or, (b) if the words used had been so clearly defined by the Interstate Commerce Commission that the court could say as a matter of law what their meaning is to be in every court proceeding which might involve their definition.

Appellee makes no attempt to justify the action of the trial court upon the basis that the words "dangerous explosives" are used in their common or ordinary sense. The contention is that the definition of the term is so clearly established by regulations and Commission decisions that no confusion in definition possibly could remain.

Under the regulation of the Interstate Commerce Commission explosives are defined as falling within two classes: (a) forbidden explosives, and (b) acceptable explosives. (Ex. 23, §§ 73.50, 73.51, 73.52.)[7] It is only those explosives which a carrier may accept for transportation, i.e., acceptable explosives, which are subdivided into classes A, B and C respectively. These regulations as they exist today nowhere define what constitutes a "dangerous explosive". Superseded regulations at one time did use the words "dangerous explosives" to define those explosives which were then classified as Class A.

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[7]Throughout this Reply reference to effective regulations will be to the appropriate section number as it appears in Exhibit 23. For cross-reference to the official regulation see Volume 49 Federal Code of Regulations at the appropriate section number which is in all instances the same as the section number assigned in Exhibit 23.

Appellant is aware that in *Strickland Transportation Co., Inc.—Extension—Dangerous Explosives,* 49 M.C.C. 595 (1949)[8], the Commission did state that under the regulations *as they then existed* those explosives which were described as "dangerous" and "less dangerous" should be considered as "dangerous explosives", as those terms were used in certificates issued to motor carriers. Appellant desires in this connection to call attention again to the numerous decisions of the United States Supreme Court in which it has been held that determinations in decisions of the Interstate Commerce Commission and other administrative agencies dealing generally with the subject under consideration in the particular case do not preclude the necessity for the application of the "primary jurisdiction" doctrine where it is otherwise called for.

Morrisdale Coal Co. v. Pennsylvania R. Co., 230 U. S. 304, 33 S. Ct. 928, 57 L. Ed. 1494 (1913);

Midland Valley R. Co. v. Barkeley, 276 U. S. 482, 48 S. Ct. 342, 72 L. Ed. 664 (1927);

U. S. Navigation Co., Inc. v. Cunard S. S. Co., 284 U. S. 474, 52 S. Ct. 247, 76 L. Ed. 408 (1932);

St. Louis B & M R. Co. v. Brownsville Nav. Dist., 304 U. S. 295, 58 S. Ct. 868, 82 L. Ed. 1357 (1937).

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[8]Hereafter referred to as the *Strickland case.*

Appellee assumes in its argument that the words Class A and Class B as used in the *current* regulations are synonmous with the words "dangerous" and "less dangerous" as used in the *superseded* regulations. In its amendment of its regulations effective May 3, 1950 the Interstate Commerce Commission changed §73.52 only in that it removed therefrom the words "dangerous" and "less dangerous". (Compare Ex. 23, §73.52, Ex. 24, §51.) The position for which appellee contends requires the assumption, wholly without basis, that this change in language, *the only change made in the cited section,* had no substantive purpose. The argument also overlooks the fact, as has been pointed out in appellant's opening brief, that §73.53 and subsequent sections of the regulations were at the same time changed in a number of substantial particulars as to the specific tests which should be applied to determine within which classification a particular commodity should fall. (Compare Ex. 23, §§ 73.53, 73.88, 73.100 and Ex. 24, §§ 54-75.) The changes in the regulations above noted were made subsequent to the decision in the *Strickland case.* These changes were substantive in character.

The issue of the meaning of the words "dangerous explosives" cannot be divorced from the jurisdictional question. The question here at issue is not whether the trial court came to a reasonable conclusion as to the meaning of the terms on the basis of its own judgment. The question is whether or not the regulations and decisions of the Commission were so clear and certain

that as a matter of law no definition other than that applied by the trial court would be possible. It is respectfully submitted that no such degree of certainty exists; that the decision of the trial court was one of fact on a technical question; that other courts presented with the same facts might reasonably reach a different conclusion as to the meaning of the words. The question being one of fact and not of law the proper procedure under the "primary jurisdiction" doctrine is the dismissal of the case.

3. The freight bills made and issued by appellant were not competent evidence to prove the fact of transportation and the explosive characteristics of the products.[9]

Appellee in its argument A.3 confuses two separate and distinct issues. The first, is the propriety of admitting at all Exhibits 3-22 as proper documents under the regular course of business exception to the hearsay rule. The second, is the sufficiency of those documents, assuming their admissibility, standing alone to prove the fact of transportation and the explosive properties of the articles transported.

The business records doctrine is founded ultimately upon the presumption that some person in the ordinary course of business and with knowledge of the facts made the entries or provided the information from which the entries could be made. Here the presump-

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[9]Appellee's Brief, Argument A.3, pp. 13 to 19 inclusive.

tion that the person making up the freight bills of appellant had knowledge of the facts, is directly refuted by the information of record that the trucks were sealed. The person making the entries could not have known the facts. Nor is there any basis for assuming in the record that the information came from a person called upon to furnish reliable information. The record is silent as to the source of the information. We can conjecture but we do not know. Before the presumption would be justified that the freight bills of the defendant are probative evidence of the facts recited the following assumptions, at least, would be required: (a) that some unknown person with sufficient knowledge of the explosive characteristics of the products shipped and of the terminology of the regulations properly classified the products according to appropriate language in the regulations; (b) that the judgment of this person was properly transcribed in the course of a business other than appellants to a bill of lading; (c) that the initiating carrier's representative properly transcribed the information from the government bill of lading; (d) that the bill of lading and this additional documentation of the initiating carrier accompanied the shipment; (e) that it was made available to the persons who prepared Exhibits 3-22 inclusive; (f) that this information was used by such persons as the source of the documents prepared. The record is silent as to all of these important facts. The United States did not explain its failure to produce this information.

The mere fact that documents are kept in the course of business and that they must be kept as a matter of law for certain purposes does not *ipso facto* make them admissible in evidence for all purposes.

Schmeller v. United States, 143 Fed. (2d) 544, (CCA-6) (1944).

Appellee has cited no case comparable on its facts to the fact situation here presented.[10] Admittedly, the freight bills of a common carrier are in *normal circumstances* business documents. Freight bills are, however, normally prepared only after the carrier has compared the contents of the shipment with the bill of lading and is in position to say that the descriptions contained in the bill of lading are correct. (Tr. 170.) In every case cited by appellee, the carrier had the opportunity to acquaint itself with the facts before preparing the shipping document. The bill of lading (not the freight bill) is the primary shipping document. In each of the cases cited by appellee, the bills of lading were presented in evidence. In the instant case the appellee relies entirely upon a document introduced by a person having no connection with the preparation of the document and no knowledge of the facts. It affirmatively appears that the person or persons preparing the document could not have had direct knowledge of the facts. Appellee has made no effort to show the source of the information or the reliability of that source as a basis

[10]The reference is to cases appearing at pages 14, 17, and 18 of the Appellee's Brief.

of information to the entrant. It is respectfully submitted that the cases heretofore cited by appellant in its opening brief are controlling of the fact situation here presented and that Exhibits 3-22 should not have been received in evidence.

Even assuming the admissibility of the documents for some purposes; it does not follow that they are, standing alone, sufficient proof of the fact of actual transportation and of the explosive properties of the articles transported. The courts have consistently held, that the fact as to what the article is in criminal cases of this type must be established by evidence independent of that which is contained in a business document.

United States v. Garvey, 150 Fed. (2d) 767 (C.C.A. 1st) (1945);

Schmeller v. United States, 143 Fed. (2d) 544, (C.C.A. 6th) (1944);

John Irving Shoe Co. v. Dugan, 93 Fed. (2d) 711, (C.C.A. 1st) (1937);

Lomax Transportation Co. v. United States, 183 Fed. (2d) 331, (C.C.A. 9th) (1950);

Reineke v. United States, 278 Fed. 724, (C.C.A. 6th) (1922);

Ellis v. United States, 57 Fed. (2d) 502, (C.C.A. 1st) (Cer. Den. 287 U. S. 635, 53 S. Ct. 85, 77 L. Ed. 550) (1932).

4. The transportation by appellant was not knowing or willful within the meaning of the statute.[11]

The essence of appellee's argument A.4 is that the offense charged is *malum prohibitum* and that as such no specific evil intent is required. Appellant at no time has contended that it is necessary for the United States in this case to prove an evil purpose in the appellant's actions. Appellant has contended consistently throughout this proceeding that it cannot be found to have willfully disregarded its certificates, where, as is here the case, the order which the United States contends it should comply with, is itself uncertain and indefinite.

As is pointed out in the opinion of the Supreme Court in a case cited by appellee, "A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalty, and to guide the judge in its application and the lawyer in defending one charged with its violation."

Boyce Motor Lines, Inc. v. United States, 342 U. S. 337, 96 L. Ed. 249, 252 (1951).

The question is whether or not the language of the certificate was sufficiently clear and certain to give notice of the required conduct. Neither independent study of the regulations nor the advice of counsel produced a satisfactory answer as to the meaning of the term "dangerous explosives." (Tr. 186-188.) De-

[11]Appellee's Brief, Argument A.4, pp. 19-22, also Argument B.1, pp. 23-24.

spite appellee's assertion the application filed did include, as to the territory here involved, a question of clarification of language. (Ex. 2, Tr. 193-196.)

Appellant respectfully submits that the language in its certificate was not clear and certain and that it did not contain, when read with the effective regulations, language which was sufficiently certain to place the appellant on notice of what it might transport and what it should not transport.

In its argument number B.4 appellee replies to a contention which has not been made. Appellant does not urge that interpretation of its certificate is for the military authorities and not for the Interstate Commerce Commission. The testimony that appellant's certificate was made available to the Department of Defense was cited as factual information related to the question of the willful character of the action charged. The circumstances surrounding the conditions under which this traffic began to move is but one in a series of things bearing upon the question of appellant's intent.

5. The "primary jurisdiction" doctrine is applicable.[12]

In its argument B.2, appellee contents itself with the citation to, and comment upon, certain of the cases already cited and discussed in the appellant's Opening Brief. The question of the place of the "primary jurisdiction" doctrine in this appeal has been discussed

[12]Appellee's Brief, Argument B.2, pp. 24-32.

both in the opening brief and in Part 2 above. The basic weakness in appellee's Argument B-2 is that appellee assumes that the term "dangerous explosives" has a fixed and certain meaning simply because a number of explosive items designated as being Class A or B under superceded regulations continue under the new classification in the same category. Such an assumption cannot be made without at the same time making the wholly unwarranted assumption that the Interstate Commerce Commission, although it changed the regulations to remove therefrom the words "dangerous" and "less dangerous", did not intend this change to have any meaning.

The changes in the regulations in question were changes not only in definition and classification but in the substantive requirements with respect to the explosive characteristics which a particular article must have in order to qualify under one classification or another. The *Strickland case* refers not to Class A, Class B and Class C explosives but to "dangerous," "less dangerous" and "relatively safe" explosives. With the *Strickland case* in hand a person engaged in an inquiry as to the meaning of the words "dangerous explosives" as used in a certificate can search in vain through the currently effective regulations for any provisions classifying them upon that basis. Other cases of the Commission cited by Appellee are not entirely consistent with the language of the *Strickland case.*

Novick—Extension of Operations—Explosives, 34 M.C.C. 693 (1942);
Buckingham Transportation Co.—Extension—Explosives, 46 M.C.C. 1098 (1946), 5 Fed. Car. Cas. Sec. 31,151.[13]

In view of all the circumstances, it is respectfully submitted that ample grounds exist for honest and reasonable differences of opinion as to what the meaning of the questioned language may be. Certainly the subject is not one so clear and certain that the meaning of the technical term can be considered to have been established as a matter of law. A fact question is involved in determining the meaning of the words "dangerous explosives". The "primary jurisdiction" doctrine should have been applied and the case dismissed.

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[13]For comment upon the language of the cases cited see Item 2 of the Appendix.

V.

CONCLUSION

It has come to the attention of counsel for appellant that in the process of printing the opening brief certain typographical errors in references to sections of Exhibits 23 and 24 were made. To eliminate confusion and misunderstanding which might otherwise result appellant sets forth in Item 3 of the Appendix to this Reply the corrected references. No substantive changes in thought or context are involved.

Appellant respectfully submits that appellee has failed to meet or answer any of the basic contentions put forward by appellant as the basis of appeal herein.

Dated: Los Angeles, California
November 7, 1952

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Appendix

APPENDIX

Item No. 1

a. In a considerable number of decisions the Interstate Commerce Commission has used the term "except high explosives" rather than the term "except dangerous explosives" to accomplish substantially the same restrictions in "general commodity" certificates:

See:

M. F. Lyman Extension—Monticello—Bluff, Utah, 20 M.C.C. 346 (1939);

Rodney v. Jackson Common Carrier Application, 19 M.C.C. 199 (1939);

Tidewater Express Lines, Incorporated, Common Carrier Application, 8 M.C.C. 157 (1938);

Tri-State Motor Ways Common Carrier Application, 14 M.C.C. 249 (1939).

b. In other instances the Interstate Commerce Commission has used the phraseology "except high explosives" or "except dangerous explosives" after which a qualification is inserted allowing the transportation of certain explosives such as small arms ammunition which are classified in the regulations as relatively safe for transportation.

M. F. Neimeyer Common Carrier Application, 20 M.C.C. 609 (1939), (the language used is "except high explosives, except small arms ammunition");

Consolidated Shippers, Inc., Common Carrier Application, 28 M.C.C. 801 (1941), (the language used in the certificate although not specifically set forth in the reported decision, is "except dangerous explosives other than small arms ammunition and fireworks.")

Item No. 2

a. In *Novick—Extension of Operations—Explosives*, 34 M.C.C. 693 (1942),[1] the Interstate Commerce Commission in granting a certificate to the applicant stated:

"Applicant will be granted authority for the transportation from and to all points on his present authorized routes of explosives classed as 'Less Dangerous—Class B' and 'Relatively safe Explosives—Class C' and other dangerous articles acceptable for transportation by motor carrier freight service, as provided in the Commission's explosive regulations, subject to any revision that may be made therein in the future. This will permit applicant lawfully to transport fireworks, small arms ammunition, inflammable liquids, *and many other articles classed in such explosives regulations as safe for motor carrier transportation,* which, under his present authority he may not do." (Emphasis added.) (p. 697.)

Note: The language above quoted would seem to indicate that the Commission considered as "safe for transportation" all explosive items listed in

[1]Erroneously cited in Appellee's Brief as 37 M.C.C. 693 (1942).

Class B under the regulations. It is difficult to reconcile the language above quoted with the position here taken by the appellee.

b. The case of *Buckingham Transportation Co.—Extension—Explosives,* 46 M.C.C. 1098, (more fully reported in 5 Fed. Car. Cas. Sec. 31151) contains the following language:

> "The term 'explosives' used by applicants herein covers all forms of explosives, regardless of the hazard involved in transportation, from small-caliber ammunition and *black powder used by farmers and contractors* to highly dangerous explosives. The Commission's rules and regulations governing the transportation of explosives and other dangerous articles, including amendments thereof and supplements thereto, divide these products into 3 categories insofar as transportation hazard is concerned, namely, Class A, dangerous explosives, Class B, less dangerous explosives, and Class C, relatively safe explosives. The only form of exception presently specified in applicants' general commodity certificate is that of 'dangerous explosives' *from which it may be inferred that they already are authorized to transport all explosives not defined* as 'dangerous' in the Commission's rules and regulations." (Emphasis added.)
>
> Note: The foregoing quotation is clearly subject to the interpretation that only those explosives listed in the regulations as Class A-Dangerous are intended to be included in the exception in the certificate. The meaning of the term is further

confused by the reference to black powder as having a transportation hazard comparable to small arms ammunition. Under current regulations black powder would be a Class A and small arms ammunition a Class C explosive. (Ex. 23, Sec. 73.60, Sec. 73.101.)

Item No. 3

As is more fully explained in the Brief, the following omissions or errors have been discovered in reference to section numbers in Exhibits 23 and 24 in the text of the appellant's Opening Brief. There is set forth in the following table by reference to the appropriate page and line a statement of the text as it appears in the Opening Brief and a statement of the correct regulation reference:

Page 11, line 9, "75.50" should read "73.50".

Page 12, line 2, "(Ex. 73.53)" should read "(Ex. 23, § 73.53)".

Page 12, line 4, "(Ex. 23, § 83.88)" should read "(Ex. 23, § 73.88)".

Page 12, line 27, "§ 73.53(1)" should read "§ 73.53(i)".

Page 14, line 19, "(Ex. 4, § 51, p. 38.)" should read "(Ex. 24, § 51, p. 38)".

Page 14, line 25, "(Ex. 23, § 73.53(1)" should read "(Ex. 23, § 73.53(i))".

Page 28, line 31 (last line), "Section 73.801" should read "Section 77.801".

Page 29, line 10, "§ 75.5" should read "§ 72.5".